BEAN KINNEY & KORMAN PC

Getting it done.

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BUSINESS LAW NEWSLETTER

ESTATE PLANNING ALERT

by Jonathan C. Kinney, Esq.

Estate of Trotter v. Commissioner handed down by the United States Tax Court on September 25, 2001, raises questions regarding the use of "Crummy" powers in a standard Crummy Insurance Trust.

For years it has been common practice to fund a Crummy Trust with only the insurance policy itself. The grantor traditionally makes a payment to the trust at least thirty days prior to the annual premium date on the insurance policy, allowing the trustee to send Crummy Notices to the beneficiaries (generally the grantor's children), who have thirty days to demand withdrawal of their proportionate share of the annual insurance payment. Reliance upon this right of withdrawal has justified treatment of the trust as a gift and thus subject to the annual $11,000 gift tax exclusion for the grantor. In most family situations, the beneficiaries do not exercise the right of withdrawal of their share of the premium.

In *Estate of Trotter*, the donor created an irrevocable trust in 1993 and funded the trust with a single condominium. The trust included a Crummy power offering each of the beneficiaries the opportunity to withdraw a proportionate share of each gift to the trust. The donor continued to live in the property until her death and did not pay rent on the property, but paid all expenses related to the condominium (all maintenance, condominium fees, taxes and premiums for the insurance coverage). The condominium was the only asset in the trust estate. In this case, the tax court stated:

> ...We cannot blind ourselves to the reality of the family relationships involved, and the estate has failed to show that the withdrawal rights were anything more than a paper formality without intended economic substance. In addition, such construction is strengthened still further by the fact that the trust's having been funded solely with a single piece of real estate would have made any attempt to effectuate withdrawal complex and burdensome at best. While it is not entirely clear from the documents how the provision would operate in this circumstance, we doubt that any beneficiary would seriously have contemplated forcing the trustee to sell the home so that he or she could collect their $10,000. (now $11,000)

The dispositive factor in the Court's analysis was that the single piece of real estate, with which the trust was solely funded, would have had to be sold to accommodate the Crummy invasion powers. The implication, in the Court's opinion, is that where invasion is highly unlikely, the invasion rights should be considered illusory and ignored. In order to avoid the effect of this rule in an Insurance Trust with Crummy powers, grantors should consider adding additional funds to the trust in an amount equal to what a beneficiary could withdraw on an annual basis. Without other assets, the Crummy Trust's insurance policy would effectively be allowed to lapse in order to meet the beneficiaries' withdrawal request.

Trustees should hold assets in trust sufficient to pay one year's insurance premium at all times. For some taxpayers, this may be an impossible goal because of limitations on the annual gift exclusion. At a minimum, they can start by increasing the annual payments, so the trustee, over time, can develop a trust nest egg sufficient to give substance to the Crummy withdrawal rights of the beneficiaries. ◈

IN THIS ISSUE:

- Estate Planning Alert.....page 1
- Sexual Harassment.....page 2
- New Identification Requirements.....page 2
- Unauthorized Practice of Law.....page 3
- Changes in Jurisdictional Limits.....page 3
- Tax Liens Attach to Jointly Held Property.....page 3
- Meet Our Lawyers.....page 3

SEXUAL HARASSMENT

By James V. Irving, Esq.

In a contemporary business climate in which employee litigation is common, employers are conscious of the risks a sexual harassment complaint entails. Farsighted employers take precautionary steps to address that risk, both because doing so minimizes the possibility of an offensive act taking place, and because affirmative efforts to prevent sexual harassment provides some level of defense should a sexually offensive act take place in the workplace. The first line of defense is to develop an effective sexual harassment policy, make it part of your company's policy manual, and see that it is enforced.

Sexual harassment can arise from what may seem at the time to be innocuous banter, and can take several forms, including "hostile work environment," in which unwanted words and actions of a sexual nature are so pervasive that it unreasonably interferes with an employee's ability to perform his/her job. The courts have also recognized *quid pro quo* harassment, in which an employee is effectively forced to choose between his/her job and unwelcome sexual demands. Employers should understand that current law imposes presumptions that may make a defense difficult. For example, if harassment is by a "supervisor," and if it includes adverse employment action, the employer is strictly liable to the employee even if it took remedial action. In a case where no negative employment action is shown, the employer may put on an affirmative defense to avoid liability. Additionally, the Supreme Court of Virginia has increased the monetary award permitted to a plaintiff for sexual harassment by allowing a plaintiff to show that continued sexual harassment episodes compounded the level of stress.[1]

Sexual harassment complaints pose several risks, including not only the possibility of a hefty damage award, but also potential damage to a company's reputation, and the sapping of valuable corporate resources in formulating a defense. Prevention is the first line of defense. Companies should protect themselves with a strong sexual harassment policy that is "reasonably designed to protect legitimate business interest."[2] If a company's policy is properly designed, the company may terminate an employee for violation of that policy without obligation to pay unemployment compensation. A firm policy should be in place condemning sexual harassment along with a reasonable mechanism for employees to report incidents of harassment. The policy should be freely disseminated and employees should be asked to sign acknowledging receipt of the materials.

Employers should keep in mind that the duty to investigate and remedy a claim is not dependent upon a formal complaint. On the other hand, all complaints of harassment must be promptly and thoroughly investigated. They also should be treated with the utmost confidentiality. It goes without saying that retaliation is not permitted under any circumstances. Keeping an employee on the payroll who has committed an act of sexual harassment may expose the employer to liability for negligent retention of an employee who was a hazard to other employees.[3] Even invalid claims are protected as long as they were made in good faith. Finally, the employer must take reasonable action if a complaint is verified.

While Bean, Kinney attorneys are experienced in defending sexual harassment claims, the risks and expense entailed in mounting such a defense have demonstrated the value of adopting appropriate policies designed to prevent harassment. An ounce of prevention is worth a pound of cure, and is much less expensive. ◈

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[1] *Middlekauff v. Allstate Ins. Co.*, 247 Va. 150 (1994)

[2] *Groves v. Va. Empl. Comm'n*, 2001 Va. App. LEXIS 675, *12.

[3] *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240, 246 (Norfolk, 1998)

NEW IDENTIFICATION REQUIREMENTS

RESPONSIBILITIES OF NOTARIES IN YOUR OFFICE

Effective July 1, 2002,[1] strict guidelines require notaries to take specific steps to determine an affiant's identity.

All notaries in Virginia, unless they personally know the person whose signature they are notarizing, must ascertain the identity of the person whose signature is being notarized by examination of one or more of the following documents:

- a United States passport,
- a certificate of United States citizenship,
- a certificate of naturalization,
- an unexpired foreign passport,
- an alien registration card with photograph,
- a state-issued driver's license or state-issued identification card, or
- a United States military card.

Failure to do so may expose the notary *and his employer* to the penalties for official misconduct.

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[1] *§ 47.1-14 of the Code of Virginia, relating to the duties of a notary public. [H 469] Approved April 1, 2002.*

UNAUTHORIZED PRACTICE OF LAW

By James V. Irving, Esq.

The prohibition against self-representation is one of the burdens of corporate status. Virginia courts have traditionally refused to allow corporate officers to appear in court on behalf of a corporation except in certain specific pro forma or petty matters. The Virginia State Bar Council has recently issued UPL Opinion #204 bearing upon this limitation.

Code of Virginia § 16.1-88.03 allows a corporation or partnership to represent itself in certain proceedings filed in the General District Court without an attorney, provided that a partnership signs its pleadings by a general partner and a corporation by its president, vice president, treasurer or other officer or full-time bona fide employee who is authorized to do so by the board of directors.

The bar has opined that this part of the section shall have no application to certain causes of action, which were assigned to a corporation or partnership solely for the purpose of enforcing that obligation. Moreover, under no circumstances may a non-lawyer file a Bill of Particulars, Grounds of Defense, argue motions, serve subpoenas, or undertake other of the prerogatives of litigation.

In reviewing this statute, the Virginia State Bar has insisted on limiting its application to corporations or partnerships only, since the Code's express language does not extend to other entities such as, for example, limited liability companies. Unless the legislature amends this statute, LLC's must retain an attorney to handle the incidents that corporations and partnerships may pursue themselves.

As the list of pleadings that a corporation or partnership may file in its own name is specifically set out in the statute, it is clear that the corporation or partnership may not go beyond that list without running the risk of violating the prohibition against the unauthorized practice of law. In particular, Section B of that statute prevents a corporation from undertaking the necessary steps to follow up on the institution of a lawsuit and prohibits it entirely from defending one. ◈

TAX LIENS ON JOINTLY HELD PROPERTY

by Jonathan C. Kinney, Esq.

In April 2002 the Supreme Court ruled in *U.S. v. Craft* that federal tax liens chargeable to a single individual can attach to property held by husband and wife as tenants by the entirety. The ruling by a deeply divided court appears to give tax liens a "super" priority status, allowing them to attach to property not only of the delinquent taxpayer but also to property held jointly with his or her spouse.

While this was already the law in many states, Virginia and thirteen other states had previously protected property held by a husband and wife as tenants by the entirety from tax liens of the other spouse. That will no longer be the case, at least with respect to federal tax liens, and married couples should consider other steps to protect their joint assets. ◈

MEET OUR LAWYERS …

JOSEPH P. CORISH

An Arlington County native, Joseph Corish has been a shareholder at Bean, Kinney since 1992. His practice emphasizes the representation of banks and lending institutions, the negotiation and drafting of loan documents and the representation of clients in commercial real estate transactions, and bankruptcy matters.

Joe attended Bishop O'Connell High School before receiving his undergraduate degree at the University of Richmond, where he received a BS in Business Administration with a concentration in finance and marketing. During his undergraduate years, Joe was Chairman of the Honor Counsel, among other activities. Upon graduation, Joe attended the T. C. Williams School of Law at the University of Richmond where he received his law degree. Joe thereafter accepted a judicial clerkship in Virginia Beach for federal bankruptcy judge Hal J. Bonney, Jr. He returned to Arlington in 1988, when he joined Bean, Kinney.

Joe has been married to Sandy for fifteen years and is the father of two boys and a girl. His community activities include membership on the Board of Directors of SOC Enterprises, a charitable organization dedicated to helping the physically and mentally disabled find employment. In addition to his position on the executive committee of the Walter E. Chandler Inns of Court, he is a member of the Northern Virginia Bankruptcy Bar Association, the Fairfax and Arlington County Bar Associations, and is admitted to the bars of Virginia, Maryland, and the District of Columbia. One of the firm's better golfers, when not coaching his children's sports teams he spends much of his free time on the links of Northern Virginia. ◈

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About Our Organization . . .

For over four decades, Bean, Kinney & Korman has been a leading Northern Virginia law firm that has continuously grown and diversified to meet the needs of its expanding community of clients and their increasingly complex legal needs. While we have grown in size and greatly expanded the depth and breadth of our capabilities, we have remained committed to those fundamental elements of value that are integral to our practice philosophy: experience, versatility, dedication to service, flexibility and efficiency.

Our responsive and exceptional quality service, coupled with our sensitivity to client needs, has established a professional reputation in which we take great pride. We are dedicated to achieving exceptional results for our clients in every matter we are entrusted to handle, mindful of each client's resources and unique circumstances. Delivering greater value to our clients day in and day out is how we will continue our reputation as one of the most highly regarded law firms in the Washington metropolitan region.

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